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No. 99-373

In the Supreme Court of the United States

CYNTHIA SHANNON, PETITIONER

v.

CONSOLIDATED FREIGHTWAYS CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HENRY L. SOLANO
Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
NATHANIEL I. SPILLER
Deputy Associate Solicitor
ELIZABETH HOPKINS
Attorney
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

1. Whether the court of appeals properly affirmed, as supported by substantial evidence, the decision and order of the Department of Labor's Administrative Review Board dismissing petitioner's complaint.

2. Whether this Court should revisit the dual-motive analysis of *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), in order to allow an employee who engages in protected activity to obtain monetary or injunctive relief against adverse employment actions, even where the employer proves that it would have taken the same action in the absence of the protected activity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unpublished, but the decision is noted at 181 F.3d 103 (Table). The final decision and order of the Administrative Review Board, United States Department of Labor (Pet. App. 5a-20a), is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1999. A petition for rehearing was denied on June 2, 1999 (Pet. App. 21a-22a). The petition for a writ of certiorari was filed on August 30, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Act of July 5, 1994 (Surface Transportation Assistance Act or STAA), 49 U.S.C. 31105, covered employers are prohibited from discharging or otherwise discriminating against employees for (*inter alia*) making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order," or refusing to operate a vehicle in a manner that would violate a Department of Transportation (DOT) safety "regulation, standard, or order." 49 U.S.C. 31105(a)(1)(A) and (B); see also 29 C.F.R. 1978.109(c)(1). The DOT regulation at issue in this case provides that "[n]o motor carrier shall permit or require a driver of a commercial motor vehicle to drive, nor shall any driver drive, * * * for any period after * * * [h]aving been on duty 70 hours in any period of 8 consecutive days." 49 C.F.R. 395.3(b).

The Department of Labor (DOL) investigates complaints filed under the STAA and enters a preliminary order for appropriate relief if the Department finds it reasonable to believe that the Act has been violated. 49 U.S.C. 31105(b)(2)(A). An adversely affected party may request a *de novo* hearing before an administrative law judge (ALJ), 49 U.S.C. 31105(b)(2)(B), who then issues a recommended decision and order. 29 C.F.R. 1978.109(a). The DOL's Administrative Review Board (ARB) then issues a final decision and order. 29 C.F.R. 1978.109(c)(1).[1] If the ARB finds that an employer has

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[1] The ARB is an adjudicatory body authorized by regulation to issue final decisions on behalf of the Secretary of Labor in (*inter alia*) STAA cases. See 61 Fed. Reg. 19,978 (1996) (establishing the ARB); *Varnadore* v. *Secretary of Labor*, 141 F.3d 625, 631-632 (6th Cir. 1998) (upholding the Secretary's delegation of authority to the ARB).

violated the Act, it orders abatement of the violation and appropriate relief, including reinstatement, back pay, compensatory damages, and attorney's fees. 49 U.S.C. 31105(b)(3)(A).

2. Petitioner Cynthia Shannon worked as a truck driver for respondent Consolidated Freightways Corp. (Consolidated), a commercial motor carrier, from April 1990 until she was discharged on August 31, 1994. Pet. App. 6a, 10a. Following her discharge, petitioner filed a complaint with the DOL alleging that Consolidated had discriminated against her in violation of the STAA. See *id.* at 5a.

In support of her claim of discrimination, petitioner relied on an incident that had occurred during a delivery trip that she made for Consolidated on August 24-25, 1994. On that trip petitioner exceeded the 70-hour maximum driving time imposed by 49 C.F.R. 395.3(b)(2). Because of unanticipated delays on the trip, it became apparent that petitioner would exceed the 70-hour limitation on the final leg of her journey. A dispatcher working for Consolidated instructed petitioner to log off-duty so that her driving record for the trip would not reflect that the maximum had been exceeded. Although petitioner completed the trip, she refused to log her hours as instructed, and she complained to Consolidated that the instruction was illegal. Based on those events, petitioner claimed that she had been fired in retaliation for a protected safety complaint and work refusal, in violation of 49 U.S.C. 31105(a)(1)(A) and (B). Pet. App. 8a-9a.

Consolidated pointed out, however, that it had already initiated discharge proceedings against petitioner based on an incident that had taken place in July 1994. In that incident, petitioner confronted and physically threatened Debby Dowler, a fellow employee. Immedi-

ately after that confrontation, petitioner's supervisor informed her that he intended to pursue a discharge. A discharge hearing was originally scheduled for August 2, 1994, but was postponed until August 30, 1994. By letter of August 31, 1994, petitioner was notified that she had been discharged. As was her right under the collective bargaining agreement, petitioner requested and received review of the discharge decision by a state arbitration panel, the Ohio Joint State Grievance Commission (OJSGC), which upheld the decision. See Pet. App. 3a, 5a, 7a, 18a.

3. A hearing on petitioner's STAA claim was held before an ALJ. The ALJ issued a recommended decision and order finding no evidence of retaliation for protected activity, and concluding that the discharge was motivated solely by the incident in which petitioner threatened Dowler. Relying heavily on the testimony of petitioner's supervisor that he intended to discharge her based on that incident, the ALJ concluded that petitioner would have been discharged if the hearing had been held on August 2, 1994, as originally scheduled, before the trip of August 24-25, 1994. The ALJ therefore held that petitioner had not proved that the discharge was discriminatory, and he recommended that petitioner's claim be dismissed. Pet. App. 6a, 10a-11a.

4. Applying a slightly different analysis, the ARB issued a final decision and order accepting the ALJ's recommendation to dismiss the complaint. Pet. App. 5a-20a. The ARB held that petitioner had engaged in activity protected by 49 U.S.C. 31105(a)(1)(A) "when she disagreed with, and expressed concerns to, the [Consolidated] dispatchers about logging improprieties and continuing to drive when her permissible hours were exhausted." Pet. App. 14a. The ARB also agreed

with petitioner that her protected activity had "entered into the adverse employment decision." *Ibid.*

The ARB nevertheless adopted the ALJ's recommendation to dismiss petitioner's claim. The ARB explained that Consolidated had "demonstrated that it would have discharged [petitioner] absent any protected activity." Pet. App. 14a. The ARB found nothing in the record to "dispute the ALJ's finding that [petitioner] would have been discharged had the hearing convened on August 2 as scheduled." *Id.* at 15a. The ARB also found that the decision to discharge petitioner on the basis of her confrontation with Dowler was consistent with the company's treatment of two other employees who had similarly threatened co-workers. *Id.* at 15a-16a. The ARB thus concluded that despite petitioner's protected conduct, Consolidated was "not liable for violation of STAA section 31105." *Id.* at 17a.

5. The court of appeals affirmed, holding that the ARB's decision was supported by substantial evidence in the record. Pet. App. 1a-4a. The court found that "the record convincingly suggests that the Dowler confrontation was the original and independent impetus for the plaintiff's discharge." *Id.* at 3a-4a. The court also noted the existence of record evidence showing that other employees who had threatened co-workers were also discharged. *Id.* at 4a. Because "the Dowler confrontation was a legitimate basis for discharge, and [Consolidated] did pursue [petitioner's] discharge prior to [petitioner's] safety complaints," the court sustained the ARB's decision. *Ibid.*

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this

Court or any other court of appeals. Further review is not warranted.

1. Petitioner argues (Pet. 7-10) that the court of appeals erred in finding that the decision of the ARB is supported by substantial evidence. That fact-specific claim does not warrant this Court's review. In any event, petitioner's argument lacks merit.

Petitioner contends (Pet. 10) that the state arbitration panel (the OJSGC) that reviewed the discharge decision specifically excluded the Dowler incident as a basis for the discharge. But whatever role the Dowler incident played in the OJSGC's decision,[2] evidence concerning that altercation was placed before the ALJ and the ARB. The ARB properly concluded on the record before it that Consolidated intended to and would have dismissed petitioner on the basis of the Dowler incident alone, without regard to her later protected activity. Although the ARB may defer to findings made during the course of a grievance procedure, it is not required to do so. See 29 C.F.R. 1978.112(c) ("A determination to defer to the outcome of other proceedings initiated by a complainant must necessarily be made on a case-by-case basis, after careful scrutiny of all available information."); *Yellow Freight Sys., Inc.* v. *Reich*, 8 F.3d 980, 983 n.1 (4th Cir. 1993) (ALJ may decline to defer to decision reached in arbitration proceeding). It

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[2] It is far from clear that the OJSGC refused to consider evidence regarding the Dowler incident. Although the OJSGC did refuse to admit a written statement from Dowler because it had not been provided to petitioner or her union (1 C.A. App. 230-231), both the warning letter from Consolidated about the incident, and two sworn statements from petitioner concerning the confrontation, were part of the record before the panel. *Id.* at 229-230, 420-421. Without elaboration, the OJSGC upheld petitioner's discharge "[b]ased on the evidence." *Id.* at 403.

was particularly appropriate for the ARB to choose not to defer to the arbitration panel's decision in this case because the panel, without revealing its reasoning, simply upheld the company's dismissal of petitioner. See note 2, *supra*.

Petitioner's supervisor testified before the ALJ that he had intended to dismiss petitioner based on the Dowler incident even before the events of August 24-25, 1994. See Pet. App. 14a-15a. Indeed, the company was actively pursuing discharge proceedings at the time of petitioner's protected activity. *Id.* at 4a, 14a-15a. The ARB and the court of appeals relied on the supervisor's testimony, as well as on evidence showing that dismissal on the basis of the Dowler incident was consistent with the company's treatment of other employees who had threatened their co-workers. *Ibid.* The court of appeals was therefore correct in holding that the ARB's decision is supported by substantial evidence.

2. Petitioner contends (Pet. 10-13) that she is entitled to relief under the STAA even if her protected activity was not the determinative factor in Consolidated's decision to discharge her. That argument is contrary to this Court's precedents. Petitioner cites no authority supporting her position, nor does she identify any persuasive reason for this Court to reconsider the settled legal principles on which the court of appeals relied.

In *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), a public school teacher claimed that his employer had discharged him for speech protected by the First Amendment. This Court held that even if the plaintiff established that his protected speech was a "substantial" or "motivating factor" in an adverse employment decision, the em-

ployer could defeat liability if it could show "by a preponderance of the evidence that it would have reached the same decision * * * even in the absence of the protected conduct." *Id.* at 287. The Court declined to adopt a per se rule of liability for cases in which protected activity played a part in the employer's decision, explaining that such a rule "could place an employee in a better position as a result of constitutionally protected conduct than he would have occupied had he done nothing." *Id.* at 285. The Court subsequently upheld the National Labor Relations Board's decision to apply essentially the same "dual-motive" analysis in reviewing unfair labor practice charges. See *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 398-403 (1983). The Court adopted a similar approach in resolving claims of sex discrimination under Title VII. See *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 246-249 (1989) (plurality opinion); see also *id.* at 258-260 (White, J., concurring in the judgment); *id.* at 276-277 (O'Connor, J., concurring in the judgment).[3]

Nothing in the STAA suggests that a different mode of analysis should apply here. Under the STAA, the Secretary (or her delegate, the ARB) may award back pay and order reinstatement if she finds that an employer has violated the Act. 49 U.S.C. 31105(b)(3). A violation occurs, however, only if an employee is subjected to adverse treatment "because" he has engaged

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[3] The Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1075 (42 U.S.C. 2000e-2(m)), modified the rule announced in *Price Waterhouse* to provide that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." The STAA contains no comparable provision.

in protected activity. 49 U.S.C. 31105(a)(1). In cases where the employer considered both protected and unprotected conduct before arriving at its decision, the question whether that decision was made "because" of the worker's protected activity is (absent a contrary statutory directive, cf. note 3, *supra*) appropriately resolved on the basis of the dual-motive analysis set forth in this Court's decisions.

Petitioner suggests (Pet. 11-12) that by issuing boilerplate threats of discharge for minor infractions, an employer can insulate itself from liability for violations of the STAA. That argument misapprehends the nature of dual-motive analysis under this Court's precedents. If protected activity is shown to have been a factor in an adverse employment decision, the employer must establish that it would actually have taken the same action even in the absence of the protected activity—not simply that it had previously threatened to do so. See Pet. App. 12a-13a.

Petitioner may well be correct in arguing (Pet. 12-13) that the provision of monetary remedies in cases like this one would increase the STAA's deterrent effect. But the provisions of the STAA and similar statutes that provide remedies to individuals in cases of retaliation were never meant to bear the entire burden of enforcing the underlying substantive law. Rather, primary responsibility for enforcing the substantive law rests with the enforcement agencies—here the DOT—which may impose appropriate sanctions regardless of whether a particular violation has spawned a cognizable retaliation claim. See 49 U.S.C. 521(b) (allowing DOT to obtain civil penalties or equitable relief against violators).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

HENRY L. SOLANO
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Deputy Associate Solicitor

ELIZABETH HOPKINS
Attorney
Department of Labor

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